

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

WISCONSIN GAS & ELECTRIC COMPANY,
Petitioner,

vs.

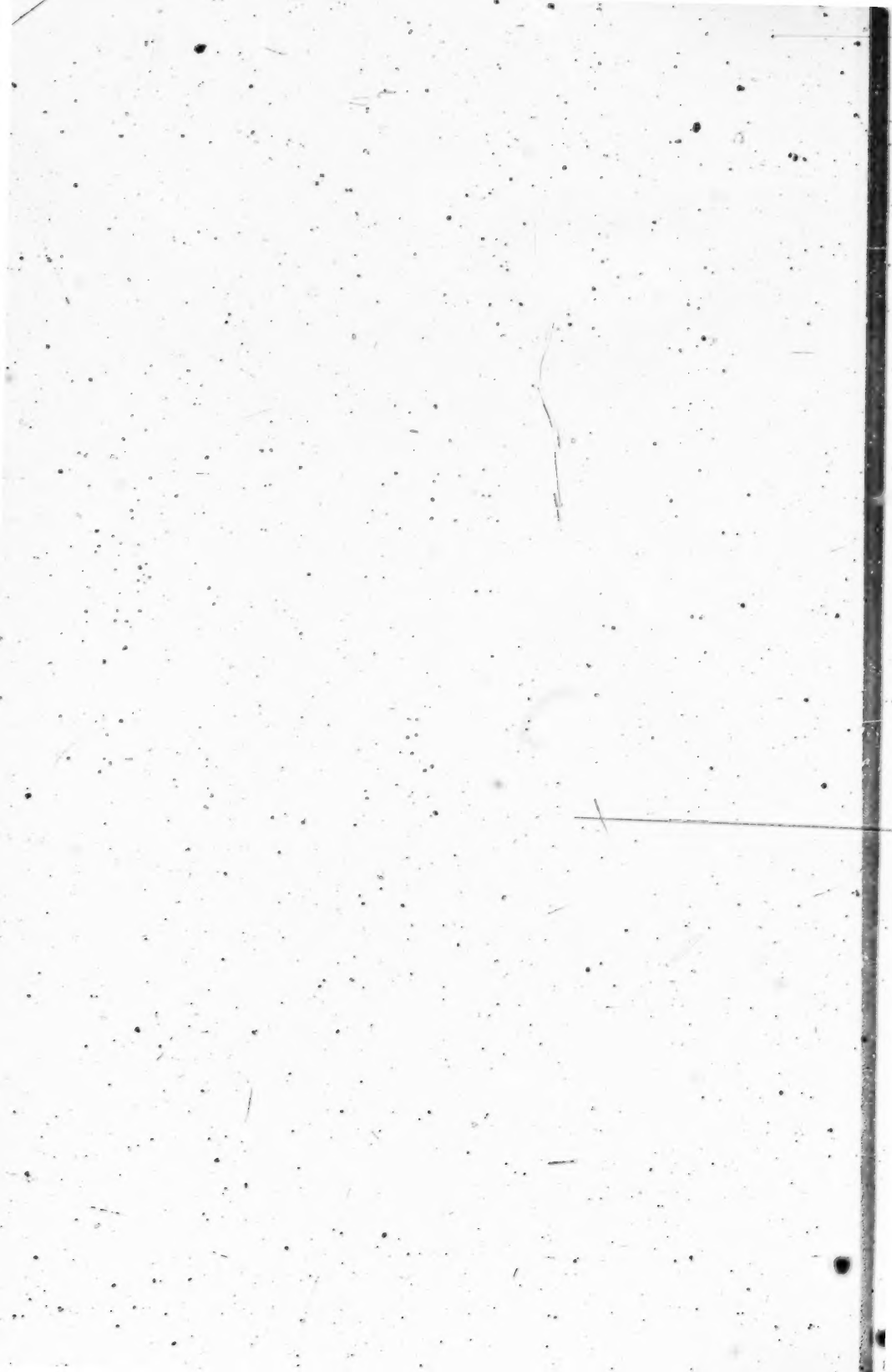
THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

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**In the
United States Circuit Court of Appeals
For the Seventh Circuit**

No. 8276

WISCONSIN GAS & ELECTRIC COMPANY,
Plaintiff-Appellee,

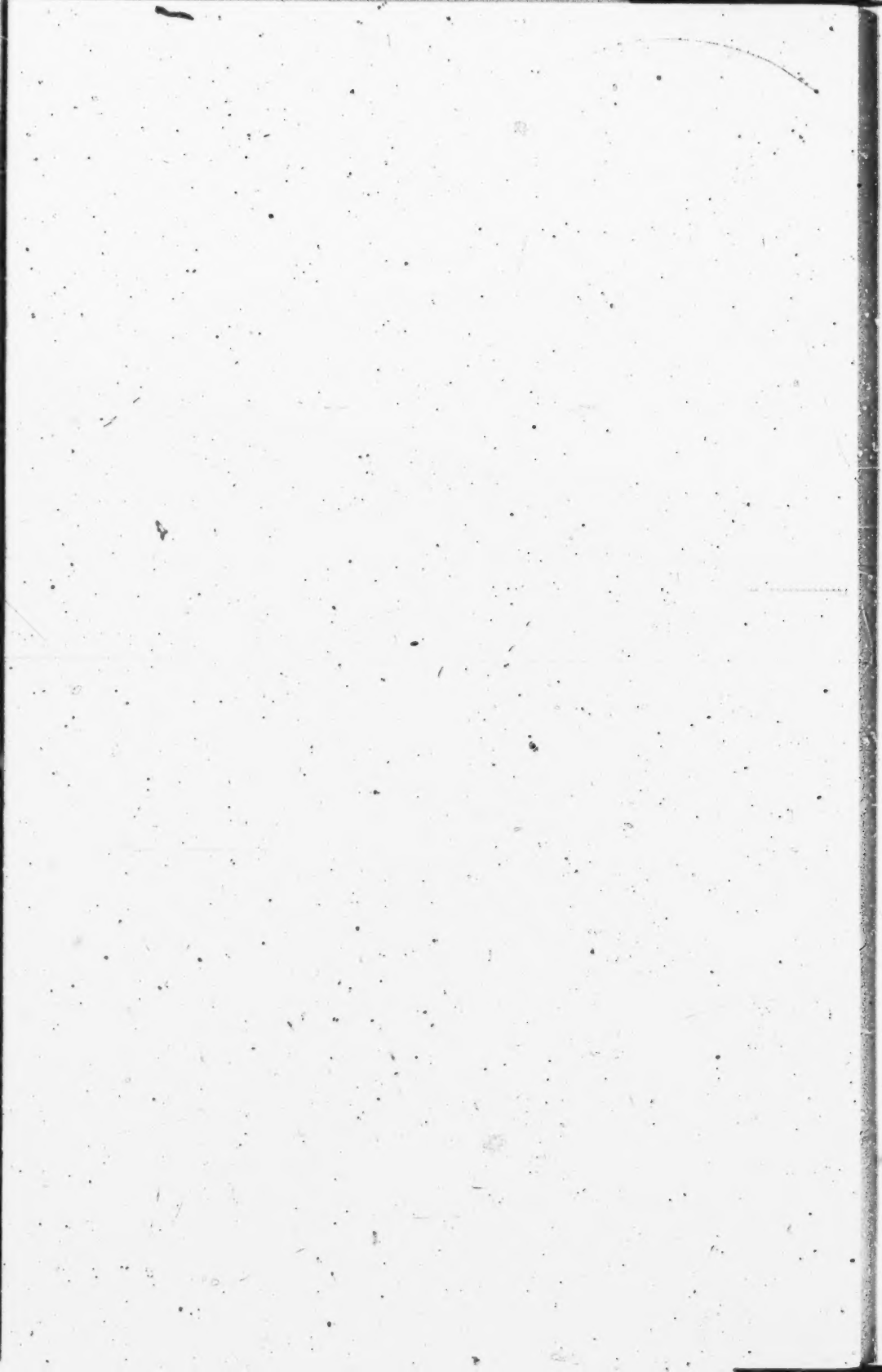
vs.

THE UNITED STATES OF AMERICA,
Defendant-Appellant.

**Appeal from the District Court of the United States for
the Eastern District of Wisconsin.**

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DISTRICT COURT OF THE UNITED STATES

Placita.

For the Eastern District of Wisconsin.

United States of America, } ss:
Eastern District of Wisconsin. }

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the City of Milwaukee, in said District, on the first Monday (being the 5th day) of October, A. D. 1942;

Present, the Honorable F. Ryan Duffy, Judge of said Court, presiding;

Among other the following proceedings were had, to-wit:

Wisconsin Gas & Electric Com- pany,	} Civil Action No. 468.
<i>Plaintiff,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant.</i>	

Be it remembered that heretofore, to-wit: on the 19th day of February, A. D. 1941, came the plaintiff and filed its complaint against the defendant as follows:

Filed
Feb. 19,
1941.

3 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—468) • •

To the Honorable Judge of the District Court for the Eastern District of Wisconsin:

Plaintiff, Wisconsin Gas & Electric Company, for a complaint herein against the defendant alleges and shows to the court:

1. Plaintiff Wisconsin Gas & Electric Company is a corporation duly organized and existing under the laws of the State of Wisconsin and is and has been engaged for a period of more than twenty years, pursuant to its articles of incorporation, in the conduct of an electric utility and other public service businesses wholly within the State of Wisconsin; that the plaintiff is and was at all times mentioned herein a resident and citizen of the eastern district of Wisconsin.

2. This is a suit of a civil nature brought to recover internal revenue taxes known as income taxes unlawfully imposed upon and collected by the defendant from the plaintiff and now held and retained by the defendant.

3. The amount in controversy, exclusive of interest and costs, is the sum of Five hundred fifteen and 63/100 (\$515.63) dollars. The suit arises under the laws of the United States relating to the recovery of refundable

4 excess internal revenue taxes, and jurisdiction is conferred upon this court by paragraph 20 of Section 24 of the Judicial Code (U. S. C. A., Title 28, Section 41-(20)).

4. Plaintiff's federal income taxes for the year 1935 were assessed and collected on the basis of the disallowance to the plaintiff of Wisconsin Dividend Privilege Taxes accruing and paid by it in the year 1935 in the amount of Three thousand seven hundred fifty (\$3,750.00) dollars. By reason of the disallowance of such payment, the income taxes assessed to and paid by the plaintiff for the year 1935 were Five hundred fifteen and 63/100 (\$515.63) dollars in excess of the amount of such taxes justly due and owing. The last payment made by the plaintiff on account of such taxes was made May 10th, 1937, and exceeded the said amount of Five hundred fifteen and 63/100 (\$515.63) dollars.

5. On May 9th, 1939, claim for refund in said amount was duly filed with the Collector of Internal Revenue at

Complaint.

3

Milwaukee, and thereafter on October 31st, 1940, the Commissioner of Internal Revenue rejected and disallowed such claim for refund. The true nature of the Wisconsin Dividend Privilege Tax has now been adjudicated by the United States Supreme Court from which adjudication it appears that payments on account of such taxes are deductible in ascertaining the amount of the corporate taxpayer's income for federal income tax purposes.

Wherefore, plaintiff demands judgment against the defendant pursuant to law in the said sum of Five hundred fifteen and 63/100 (\$515.63) dollars, with interest from December 15th, 1936, as provided by law.

/s/ James D. Shaw,
Attorney for Plaintiff Wisconsin Gas & Electric Company.

5 State of Wisconsin. }
Milwaukee County. } ss.

L. F. Seybold, being first duly sworn, on oath says: that he has read the foregoing complaint, knows the contents thereof and is informed and believes that the same is true; that this verification is made by affiant for the reason that the plaintiff is a corporation and he is an officer thereof, to wit, Vice President, and is duly authorized to make this verification for and on its behalf.

L. F. SEYBOLD.

Subscribed and sworn to before me this 13th day of February, 1941.

(Seal)

Robert B. Fisher,
Notary Public, Milwaukee
County, Wisconsin.

My commission expires November 26, 1944.

Endorsed: "Filed Feb. 19, 1941. B. H. Westfahl,
Clerk."

Filed
Apr. 15,
1941.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—468) * *

ANSWER.

Defendant, by its attorney, Berthold J. Husting, United States Attorney for the Eastern District of Wisconsin, answering the complaint in this action:

I.

Admits the allegations contained in Paragraphs "1", and "3" of the complaint.

II.

Denies the allegations of Paragraph "2" of the complaint, except that it admits that the action brought by the plaintiff is of a civil nature for the recovery of internal revenue taxes known as income taxes.

III.

Admits the allegations of Paragraph "4", except that it denies the second sentence in said paragraph.

IV.

Admits the allegations of Paragraph "5" of the complaint, except that it denies the last sentence of said paragraph.

Wherefore, defendant prays for judgment against the plaintiff, dismissing the complaint, together with the costs and disbursements of this action.

B. J. Husting,
Berthold J. Husting,
United States Attorney,
Attorney for the Defendant.

By E. J. Koelzer,
Assistant,
358 Federal Bldg.,
Milwaukee, Wis.

Endorsed: "Filed Apr. 15, 1941. B. H. Westfahl, Clerk."

7 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—468) • •

Filed
Apr. 22,
1942.

**STIPULATION FOR AGREED STATEMENT OF
FACTS.**

The parties hereto by their respective attorneys hereby agree that the issues in the above entitled action may be submitted for decision on the briefs of the parties and upon the following Agreed Statement of Facts:

1. Plaintiff, Wisconsin Gas & Electric Company, is and was during the tax year in question a Wisconsin corporation engaged, pursuant to its articles of incorporation, solely in an electric utility, gas utility, street railway or trackless trolley and steam heating business and in the sale of electric and gas appliances in connection with its said electric and gas utility businesses. All of such businesses were conducted wholly within the State of Wisconsin.

2. In a tentative return for the year 1935, filed by plaintiff on March 13, 1936, an estimated tax liability of \$43,312 was disclosed. Thereafter, on June 12, 1936, a completed corporation income and excess-profits return based on the accrual method for the calendar year 1935 showing a total tax liability of \$42,212.13 was filed.

3. Taxes in the amount of \$715,538.15 were claimed as deductions under Item 19 of the return. A schedule
8 attached to the return contained a complete analysis of the claimed deductions and disclosed that Privilege Dividend Tax amounting to \$3,750 paid to the State of Wisconsin was taken as a deduction.

4. The said privilege dividend taxes of \$3,750 paid to the State of Wisconsin for 1935 resulted from the declaration and payment of dividends by plaintiff during said year out of earnings from its public utility businesses. The said taxes were computed in accordance with Laws of Wisconsin, 1935, c. 505, as amended by Laws of Wisconsin, 1935, c. 552.

5. As a result of an examination of the books and records of the taxpayer by an Internal Revenue Agent, an additional tax in the amount of \$11,696.00 with interest thereon in the amount of \$847.96, totaling \$12,543.96, was

assessed. In addition to the disallowance of certain items not challenged by the plaintiff, the agent disallowed as a deduction the Wisconsin Privilege Dividend Tax of \$3,750.

The amount of \$12,504.30 was paid by the taxpayer on May 10, 1937, and on October 26, 1937, the remainder of the assessment, namely \$39.26, was abated.

6. On May 9, 1939, the taxpayer timely filed with the Collector of Internal Revenue for the District of Wisconsin, a claim for refund on two grounds, one of which relates to the issue herein.

On October 31, 1940, the taxpayer was officially notified of the rejection of the claim for refund in respect to the claimed deduction for dividend taxes paid to the State of Wisconsin.

7. This controversy involving \$515.65 in income taxes for the year 1935, arises solely from the disallowance of plaintiff's claim for deduction of the amount of Wisconsin privilege dividend taxes paid for the tax year 1935.

James D. Shaw,
Van B. Wake,

Attorneys for Plaintiff.

April 17th, 1942.

B. J. Husting,
*United States Attorney for the
Eastern District of Wisconsin.*

By E. J. Koelzer,
Asst. U. S. Atty.

Endorsed: "Filed Apr. 22, 1942. B. H. Westfahl,
Clerk."

Filed
Sept. 25,
1942.

9 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—468) • •

OPINION.

Plaintiff is a Wisconsin corporation. During the year 1935, as a result of declaration of dividends during that year, plaintiff paid to the State of Wisconsin the sum of \$3,750.00 as privilege dividend taxes. In computing its federal income tax for that year, plaintiff sought to claim such payment as a deduction allowed under Sec. 23(c) of the Revenue Act of 1934, but the claim was disallowed. A

claim for refund was timely made and was rejected by the Commissioner.

The Wisconsin privilege dividend tax is imposed by Sec. 3 of Chapter 505, Laws of Wisconsin for 1935, as amended. The tax is computed at a percentage of the dividends declared and paid out of corporate earnings derived from property located and business transacted in Wisconsin. The act states the tax is imposed "for the privilege of declaring and receiving dividends, out of income derived from property located and business
10 transacted in this state."

Sec. 23, Revenue Act of 1934, C. 277, 48 Stat. 680, provided:

"Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(c)" Taxes Generally. Taxes paid or accrued within the taxable year, except"

(The exceptions have no application here.)

The question to be decided is whether the plaintiff corporation is entitled to a deduction from its gross income for the year 1935 for the amount of the privilege dividend tax paid to the State of Wisconsin during the taxable year. The government contends that the tax was imposed on the shareholders of the corporation for dividends received, and that the corporation was merely a withholding or collecting agent. While admitting that the statute made the corporation liable for the collection of the tax, the government contends that this was only to insure and simplify tax collections.

The validity of the Wisconsin privilege dividend tax was challenged and the Wisconsin Supreme Court in *J. C. Penney Co. v. Tax Commission*, 233 Wis. 286, held that the tax was an excise tax and invalid in respect to foreign corporations exercising the dividend privileges outside of the State of Wisconsin, notwithstanding the transaction of business, the earning of income, and the presence of stockholders
11 within the State of Wisconsin. On appeal to the

United States Supreme Court, the Wisconsin court was reversed. *Wisconsin et al. v. J. C. Penney Co.*, 311 U. S. 435. The court divided, five to four, the majority opinion being written by Justice Frankfurter. The contention made by the government here that the tax was on the stock-

holders received support in the dissenting opinion by Justice Roberts, who said (p. 448):

"* * * By the very terms of the Act, the tax is laid not on the corporation but on the stockholder receiving the dividend and, by confession, thousands of such stockholders are not residents of Wisconsin. The corporation is the mere collector of the tax and the penalty for failure to collect it is that the corporation must pay it. If the exaction is an income tax in any sense it is such upon the stockholder and is obviously bad. It cannot, except by a perversion of the term and the affixing of an arbitrary label, be denominated a tax upon the income of the respondent."

We would be strongly inclined to agree with the opinion expressed by the minority, but are bound to follow the conclusion of the majority opinion, which states (p. 442):

"* * * The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

These words of the majority opinion cannot be lightly brushed aside. On this point there was a direct and emphatic conflict with the viewpoint of the minority. If the

Wisconsin privilege dividend Tax "is to impose an additional tax on corporate earnings," and if "by the

Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out," then there can be little doubt but that the majority of the Supreme Court held the tax to be on the corporation and not upon the shareholders. It is apparent that the validity of the tax was upheld on that basis.

This court is bound by the United States Supreme Court decision in the *Penney* case, *supra*, and it therefore follows that judgment must go for the plaintiff.

Dated at Milwaukee, Wisconsin, this 25th day of September, A. D. 1942.

F. Ryan Duffy,
Judge.

Endorsed: "Filed Sept. 25, 1942. B. H. Westfahl, Clerk."

13 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—468) * *

Filed
Oct. 5,
1942.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. This action is brought pursuant to Subdivision (20) of Section 24 of the Judicial Code within the time limited by law for the recovery of internal revenue tax in a sum less than Ten thousand (\$10,000.00) dollars alleged to have been erroneously or illegally assessed or collected.

2. Plaintiff, a Wisconsin corporation, at all times material hereto had its principal office and place of business in the Eastern District of Wisconsin and within the jurisdiction of this Court. That at all times material hereto plaintiff was engaged pursuant to its Articles of Incorporation solely in an electric utility, gas utility, street railway and trackless trolley and steam heating businesses and in the sale of electric and gas appliances in connection with its electric and gas utility businesses. All of such businesses were conducted wholly within the State of Wisconsin.

3. Plaintiff in this action filed on February 19th, 1941, seeks the refund of \$515.63, representing part of the corporate income taxes paid by it for the year 1935.

4. The claimed excess of \$515.63 in income taxes for the year 1935 resulted from the disallowance by an internal revenue agent of \$3,750.00 taken as a deduction by the plaintiff and representing dividend privilege taxes in 14 said sum of \$3,750.00 paid by the plaintiff to the State of Wisconsin for the year 1935 and during the year 1935 in consequence of the declaration and payment by the plaintiff during said year out of earnings from its public utility businesses. Such dividend privilege taxes were computed in accordance with the Laws of the State of Wisconsin for 1935, Chapter 505, as amended by the Laws of 1935, Chapter 552.

5. The last payment made by the plaintiff on account of corporate income taxes for the year 1935 was on May 10, 1937, and exceeded said amount of \$515.63.

6. On May 9, 1935, the taxpayer timely filed with the Collector of Internal Revenue for the Eastern District of Wisconsin a claim for refund, including the amount sought in this action. On October 31, 1940, the Commissioner of

Internal Revenue rejected and disallowed such claim for refund.

Upon the foregoing findings of fact the Court makes and enters the following conclusions of law:

Conclusions of Law.

1. Pursuant to the provisions of Section 23, Revenue Act of 1934, 48 Stat. 680, plaintiff is entitled to the deduction from its gross income for the year 1935 of the amount of privilege dividend tax paid to the State of Wisconsin during the taxable year.

2. Privilege dividend tax so paid is not within the exceptions to deductible taxes as set forth in said Section 23 of the Revenue Act of 1934.

3. Plaintiff is entitled to recover the sum of \$515.63 with interest at 6% per annum from December 15, 1936.

15 The Clerk of this Court is hereby directed to enter judgment accordingly.

Dated, at Milwaukee, Wisconsin, this 5th day of October, 1942.

F. Ryan Duffy,
Judge.

Endorsed: "Filed Oct. 5, 1942. B. H. Westfahl, Clerk."

Entered
Oct. 6
1942

16 And afterwards, to-wit: on the second day of said Term, to-wit: on the 6th day of October, A. D. 1942, the following proceedings were had, to-wit:

IN THE UNITED STATES DISTRICT COURT.

• • (Caption—468) • •

JUDGMENT.

The Court having filed its findings of fact and conclusions of law herein directing the entry of judgment in favor of the plaintiff and against the defendant; it is

Adjudged, that the plaintiff, Wisconsin Gas & Electric Company, do have and recover of the defendant, The United States of America, the sum of Five hundred fifteen

Notice of Appeal.

11

and 63/100 (\$515.63) dollars with interest thereon according to law from December 15, 1936.

Dated, October 6th, 1942.

By the Court,

B. H. Westphal,
Clerk.

Endorsed: "Filed Oct. 6, 1942. B. H. Westfahl, Clerk."

19 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA

Filed
Dec. 29,
1942.

For the Eastern District of Wisconsin.

Wisconsin Gas & Electric Company,	} Civil Action
<i>Plaintiff,</i>	
<i>vs.</i>	
The United States of America,	
<i>Defendant.</i>	} No. 468.

NOTICE OF APPEAL.

Notice is hereby given that the United States of America, the defendant above-named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the judgment entered in this action on the 6th day of October, 1942, in favor of the plaintiff and from the whole thereof.

B. J. Husting,

*United States Attorney for the
Eastern District of Wisconsin.*

By E. J. Koelzer,

*Assistant United States Attorney
for the Eastern District of
Wisconsin.*

*Attorney for appellant, United
States of America.*

*Rm. 358, Federal Building,
Milwaukee, Wisconsin.*

Endorsed: "Filed Dec. 29, 1942. B. H. Westfahl, Clerk."

Filed
Mar. 19,
1943.

17 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

United States of America,	} Civil Action No. 468.
<i>Appellant,</i>	
<i>vs.</i>	
Wisconsin Gas & Electric Company,	} <i>Appellee.</i>

ASSIGNMENT OF ERRORS.

Now comes the United States of America, appellant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of this appeal in the above-named case from the judgment of the District Court of the United States for the Eastern District of Wisconsin, entered on October 6, 1942.

1.

The District Court erred in its finding that the privilege dividend taxes involved, in the sum of \$3,750.00, were paid by appellee to the State of Wisconsin, to the extent that said finding suggests that the payment of privilege dividend tax referred to was made by appellee as principal rather than as agent for either its stockholders or the State of Wisconsin.

2.

The District Court erred in its conclusion that pursuant to the provisions of Sec. 23, Revenue Act of 1934, 48 Stat. 680, appellee is entitled to the deduction from its gross income for the year 1935 of the amount of privilege dividend tax paid to the State of Wisconsin during the taxable year.

18 The District Court erred in its conclusion that appellee is entitled to recover the sum of \$515.63 with interest at 6% per annum from December 15, 1936.

Wherefore appellant prays that said judgment may be

reversed and that such other and further relief may be granted as to this Court may seem just and proper.

B. J. Husting,
United States Attorney.

Endorsed: "Filed Mar. 19, 1943. B. H. Westfahl,
Clerk."

20 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—468) * *

Entered
Jan. 18,
1943.

**ORDER EXTENDING TIME FOR FILING RECORD
ON APPEAL AND DOCKETING ACTION.**

The above-named defendant, United States of America, having on December 29, 1942, filed its notice on appeal from the judgment entered in this action on the 6th day of October, 1942, upon application of said defendant and appellant;

It Is Ordered that the time for filing the record on appeal and docketing the action be and it hereby is extended to ninety days from December 29, 1942.

Dated at Milwaukee, Wisconsin, this 18th day of January, 1943.

F. Ryan Duffy,
United States District Judge.

Endorsed: "Filed Jan. 18, 1943. B. H. Westfahl,
Clerk."

21 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—468) * *

Filed
Mar. 12,
1943

DESIGNATION OF RECORD ON APPEAL

Appellant, defendant in above entitled action, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above entitled case:

1. The Complaint.
2. The Answer.
3. The Stipulation of Facts.

Clerk's Certificate.

4. Opinion of Court directing judgment in favor of Plaintiff.
5. Findings of Fact and Conclusions of Law.
6. Judgment in favor of Plaintiff.
7. Notice of Appeal, with date of filing.
8. Order filed January 18, 1943, extending time for filing Record on Appeal.
9. Assignment of Errors.
10. This Designation.

B. J. Husting,
*United States Attorney, Eastern
 District of Wisconsin,*
 By: Elsmere J. Koelzer,
*Assistant United States
 Attorney,*
 358 Federal Building,
 Milwaukee, Wisconsin.

Endorsed: "Filed Mar. 19, 1943. B. H. Westfahl,
 Clerk."

22

CERTIFICATE OF CLERK.

United States of America, }
 Eastern District of Wisconsin. } ss.

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, which are copies, with their originals now on file and remaining of record in my office, and that they are true copies of the pleadings, judgment and other papers; in the case of Wisconsin Gas & Electric Company vs. United States of America, No. 468 Civil Action.

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said Court at the City of Milwaukee, in said district, this 25th day of March, in the year of our Lord, one thousand nine hundred forty-three, and of the Independence of the United States, the 167th.

(Seal)

B. H. Westfahl,
 Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-second day of April, 1943, in:

Cause No. 8276.

Wisconsin Gas & Electric Company,
Plaintiff-Appellee,

vs.

The United States of America,
Defendant-Appellant.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago; this 14th day of December, A. D. 1943.

(Seal)

(signed) Kenneth J. Carrick,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence, the one hundred and sixty-seventh.

Wisconsin Gas & Electric Company,
Plaintiff-Appellee,

8276

vs.

The United States of America,
Defendant-Appellant.

} Appeal from the District
Court of the United
States for the Eastern
District of Wisconsin.

And, to-wit: On the twenty-sixth day of March, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Wisconsin Gas & Electric Company,
Plaintiff-Appellee,

vs.

The United States of America,
Defendant-Appellant.

} No. 8276.

The Clerk will enter our appearance as counsel for the plaintiff and appellee, Wisconsin Gas & Electric Company.

Dated, February 4th, 1943.

James D. Shaw,
Van B. Wake.

P. O. Address:

773 North Broadway,
Milwaukee, Wisconsin.

Endorsed: Filed March 26, 1943. Kenneth J. Carrick,
Clerk.

Appearance for Appellant.

And afterwards, to-wit: On the twenty-seventh day of April, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Cause No. 8276.

United States of America,

Appellant,

vs.

Wisconsin Gas & Electric Company,

Appellee.

The Clerk will enter our appearance as counsel for Appellant.

Samuel O. Clark, Jr.,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

Sewall Key,
Special Assistant to the At-
torney General,
Department of Justice,
Washington, D. C.

Indorsed: Filed April 27, 1943. Kenneth J. Carrick,
Clerk.

And afterwards, to-wit: On the twelfth day of October, 1943, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 12, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.
Hon. Walter Lindley, District Judge.

Wisconsin Gas & Electric Company,

8276

Plaintiff-Appellee,

vs.

The United States of America,

Defendant-Appellant.

} Appeal from the District
Court of the United
States for the Eastern
District of Wisconsin.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Fred E. Youngman, counsel for appellant, and by Mr. James D. Shaw, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the eighth day of November, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
For the Seventh Circuit.

No. 8276.

October Term and Session, 1943.

WISCONSIN GAS & ELECTRIC COM-
PANY,

vs. *Plaintiff-Appellee,*

THE UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the District
Court of the United
States for the Eastern
District of Wisconsin.

November 8, 1943.

Before MAJOR and MINTON, *Circuit Judges*, and LINDLEY,
District Judge.

MINTON, *Circuit Judge.* The State of Wisconsin has what is called the Privilege Dividend Tax Law. The pertinent provisions thereof we set forth in the margin.¹

1. "SECTION 3. PRIVILEGE DIVIDEND TAX. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of Section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make returns thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and prop-

The Wisconsin Gas and Electric Company, the plaintiff-appellee, is a utility corporation whose total business is done in Wisconsin. It is a Wisconsin corporation. In 1935 the plaintiff declared a dividend of \$150,000. It distributed \$146,250 to its stockholders, and paid 2½% of the dividend declared, or \$3,750, to the Tax Department of the State of Wisconsin. The plaintiff deducted this \$3,750 as an expense on its Federal income tax return for 1935. The Commissioner disallowed the deduction and assessed a deficiency. The plaintiff paid the assessment and sued to recover what it claimed to be an excessive assessment. The District Court sustained the position of the plaintiff, and gave judgment accordingly. From this judgment, the Government has appealed.

The sole question is whether the plaintiff was entitled to deduct in 1935 under Sec. 23(c) of the Revenue Act of 1934 the amounts paid pursuant to the Wisconsin Privilege Dividend Tax Law. The answer to this question depends upon whose burden it is to pay this tax.

The power of Wisconsin to exact such a tax was upheld by the United States Supreme Court in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267. Since that decision, the Supreme Court of Wisconsin has answered the question as to where this burden rests. In the case of *Wisconsin Gas & Electric Company v. Wisconsin Tax Department*, 243 Wis. 216, 10 N. W. (2d) 140, the Wisconsin Gas and Electric Company, the same company that is the plaintiff here, claimed the payment of the Privilege Dividend Tax as a deductible expense against its gross income under the Income Tax Law of Wisconsin, just as it is claiming here the payment of such tax as a deductible expense under the Federal statute. The Supreme Court of Wisconsin denied such claim, saying:

"We are certain of three things: (1) that the burden of the tax is specifically laid upon the stockholder;

erty located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission, shall, upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

(2) that the corporation declaring the dividend must deduct the tax from the dividend and may not under any circumstances treat the tax as a necessary expense of doing business; (3) that the power to levy the tax so construed was authoritatively established in the *Peiney* case."

On the same day, the Supreme Court of Wisconsin decided *Blid v. Wisconsin Foundry and Machine Co.*, 243 Wis. 221, 10 N. W. (2d) 142. In that case, a preferred stockholder sued the defendant corporation to recover from it the amount it had withheld from a dividend it had declared, and which amount the corporation had paid over to the State of Wisconsin in literal compliance with Sec. 3, Chap. 505 of the Wisconsin Laws of 1935, as amended. The plaintiff's contention was that while the language seems to place the tax on the stockholder, it must be ignored in view of the fact that the corporation alone is liable for the tax and the penalties if not paid, and there is no personal liability imposed on the stockholder. A demurrer to the complaint was sustained, the complaint dismissed, and from this judgment an appeal to the Wisconsin Supreme Court was taken. On the authority of *Wisconsin Gas & Electric Company v. Wisconsin Tax Department*, *supra*, the cause was affirmed.

Thus it will be seen that the Supreme Court of Wisconsin has decided very clearly that the burden of this tax is upon the stockholder and not upon the corporation, and that it was not an expense of the corporation.

In determining who is liable for a State tax and who may deduct it as an expense, the Federal courts will follow the decisions of the State courts. *Keith v. Johnson*, 271 U. S. 1, 8, 46 S. Ct. 415, 70 L. Ed. 795; *Magruder v. Supplee*, 316 U. S. 394, 396, 62 S. Ct. 1162, 86 L. Ed. 1525.

In the case at bar, the tax is laid against the dividend. If there is no dividend declared, there is no tax. When a dividend is declared, it is the property of the stockholder, and he may sue for it as a debt due him from the corporation. *Chesapeake and Delaware Canal Co. v. United States*, 250 U. S. 123, 126, 39 S. Ct. 407, 63 L. Ed. 889.

At the time this case was decided by the District Court, the Supreme Court of Wisconsin had not decided *Wisconsin Gas & Electric Company v. Wisconsin Tax Department*, *supra*, and *Bield v. Wisconsin Foundry and Machine*

Company, supra. The trial court relied upon *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267. The reasoning of that case would seem to sustain the District Court's position. Power to tax was the only question before the court in the *Penney* case. Who shall be entitled to enjoy some incidence of the tax payment is our question. In view of the facts that the plaintiff is a Wisconsin corporation and all of its business is done in Wisconsin, and that there is no finding that any of its stockholders are non-residents of Wisconsin, the factual situation is clearly distinguishable from the *Penney* case.

We think the plaintiff was not entitled to claim the deduction, and that the deficiency was correctly determined. The judgment of the District Court is

REVERSED.

Endorsed: Filed November 8, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the eighth day of November, 1943, the following further proceedings were had and entered of record, to-wit:

Wisconsin Gas & Electric Company,

Plaintiff-Appellee;

8276

vs.

The United States of America,

Defendant-Appellant;

} Appeal from the District
Court of the United
States for the Eastern
District of Wisconsin.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court.

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UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing briefs, in:

Cause No. 8276.

Wisconsin Gas & Electric Company,
Plaintiff-Appellee,

vs.

The United States of America,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 14th day of December, A. D. 1943.

(signed) Kenneth J. Carrick,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

(Seal)



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 31, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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